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No. 07-1216

IN THE

Supreme Court of the United States

PHILIP MORRIS USA,

Petitioner,

vs.

MAYOLA WILLIAMS,

Respondent.

On Writ of Certiorari to the Supreme Court of Oregon

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED

Whether, after this Court has adjudicated the merits of a party's federal claim and remanded the case to state court with instructions to "apply" the correct constitutional standard, the state court may interpose—for the first time in the litigation—a state-law procedural bar that is neither firmly established nor regularly followed.

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF NEITHER PARTY

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

1. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

The issue of a procedural default rule as an adequate and independent ground of a state-court judgment arises in the context of habeas corpus review of criminal judgments by the lower federal courts as well as in the context of this Court's direct review of state judgments on certiorari. With a few exceptions, the same rules apply in both contexts. The manner in which this Court resolves the present case could have a significant impact on the finality of criminal judgments and therefore on the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

This smoking liability case is before this Court for the third time. The jury found that Philip Morris had engaged in deceit, and it awarded the estate of Jesse Williams, who had died from illness caused by smoking, $821,000 in compensatory damages and $79.5 million in punitive damages. See *Philip Morris USA* v. *Williams*, 549 U. S. 346, 127 S. Ct. 1057, 1060-1061 (2007).

After review in the state courts, the case was remanded by this Court in light of *State Farm Mut. Automobile Ins. Co.* v. *Campbell*, 538 U. S. 408 (2003). See *Philip Morris USA, Inc.* v. *Williams*, 540 U. S. 801 (2003). In the Oregon Supreme Court, Philip Morris argued that the jury instructions permitted the jury to punish it for harm to persons other than the plaintiff's decedent and that the trial court erred in rejecting its proposed instruction precluding such punishment. See 127 S. Ct., at 1064.

The Oregon Supreme Court rejected this claim on the merits. See *id*., at 1064-1065. This Court vacated and remanded, holding "that the Oregon Supreme Court applied the wrong constitutional standard . . . . We remand this case so that the Oregon Supreme Court can apply the standard we have set forth." *Id*., at 1065.

On remand, plaintiff contended that defendant's proposed jury instruction "was erroneous in a number of ways that are unrelated to the issues addressed by the United States Supreme Court," and the Oregon Supreme Court agreed. *Williams* v. *Philip Morris, Inc.*, 344 Ore. 45, 57, 176 P. 3d 1255, 1261 (2008). The state court found that because of these unrelated errors of state law in the proposed instruction, "the trial court did not err in refusing to give it. Our previous conclusion to that effect is reaffirmed." *Id.*, at 61, 176 P. 3d, at 1263. This Court granted certiorari on June 9, 2008.

SUMMARY OF ARGUMENT

This Court has used a variety of phrases over many years to describe when a state ground is "adequate" or "inadequate" to preclude federal court review of an issue. These phrases form a haphazard patchwork that has drawn considerable scholarly criticism. A coherent formulation, which takes into account the underlying policies and is consistent with the results of nearly all the precedents, is both desirable and possible.

The correct rule, *amicus* submits, is one along the lines proposed by the late Professor Charles Alan Wright, et al. That is, the claimant should have notice that the rule exists and applies to his situation and should have a reasonable opportunity to present his federal claim. See 16B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4027, pp. 386-387, 392 (2d ed. 1996).

This formulation would give the states the proper latitude to form and enforce their own consistent set of procedural rules for the presentation of all claims, state and federal. At the same time, it would enable the federal courts to step in when state rules are manipulated to evade federal law, to discriminate against

federal rights, or to facilitate invidious discrimination against disfavored groups.

Implications from previous cases that state rules must be "strict" or that they cannot be "discretionary" should be expressly repudiated. These statements create perverse incentives for states to create harsh regimes of rigid procedural defaults and to discourage needed exceptions when justice requires them.

This formulation is consistent with the results of all the major precedents except *Henry* v. *Mississippi*. That case was wrongly decided at the time, and it was also based on since-overruled precedent. *Henry* has little value as precedent and should not prevent the formulation of a coherent standard.

ARGUMENT

I. The "regularly followed" requirement has been routinely misused in the Ninth Circuit to sweep aside fair, necessary, and well-established state procedural rules.

In Part II, *infra*, we describe how the "inadequate state ground" doctrine relied on by petitioner is a confused, haphazard collection of ranging rubrics. This confused state of the law might not matter so much if it only applied to this Court's direct review of state court judgments, as in the present case, because we could be confident that the doctrine would be applied fairly and sensibly in practice, however lacking it may be in precision.

Regrettably, that is not the case. The doctrine applies equally to habeas review of state court criminal judgments in the lower federal courts. See *Lee* v. *Kemna*, 534 U. S. 362, 375 (2002). In the hands of a panel that is hostile to a state's law, such as capital

punishment or "three strikes," and looking for a way to reach defaulted claims, the "regularly followed" rubric is a dangerous weapon for effectively nullifying perfectly valid state rules. That is precisely what has happened in the Ninth Circuit.

Standard practice throughout the United States requires that claims based on the trial record be made on the direct appeal. With some exceptions, such claims are defaulted if they are raised for the first time on collateral review, and they will generally be rejected on that basis. See *Sanchez-Llamas* v. *Oregon*, 548 U. S. 331, 351 (2006). California follows this rule. It was plainly stated in a decision of the state's highest court over half a century ago, see *In re Dixon*, 41 Cal. 2d 756, 759, 264 P. 2d 513, 514 (1953), and the rule was already well established by that time. See *In re Connor*, 16 Cal. 2d 701, 705, 108 P. 2d 10, 13 (1940).

Rigid application of procedural rules can produce unjust results, and so most rules have exceptions. It is common for these exceptions to evolve and be clarified over time. The "cause and prejudice" test for federal collateral review was not fully formed until the comparatively late date of 1982, see *United States* v. *Frady*, 456 U. S. 152, 167-168, and the categorical exception of ineffective assistance claims from the raise-on-appeal rule was not settled until five years ago. See *Massaro* v. *United States*, 538 U. S. 500, 504 (2003).

In California, the *Dixon* rule contained an exception for "special circumstances constituting an excuse for failure" to raise the issue on direct appeal, 41 Cal. 2d, at 759, 264 P. 2d, at 514-515, with the boundaries of that exception left for further development. Lack of precision in the circumstances for excuse of a default does not constitute a "springe" that is unfair to the party making the claim, cf. *Davis* v. *Wechsler*, 263 U. S. 22, 24 (1923), so long as the rule itself is clear and

feasible. If the law of the state clearly tells the parties, "Make claim A via procedure X or else you *may* not be allowed to make it later," there is nothing inherently unfair about relief from default being handled on a discretionary, case-by-case basis.

This is all just common sense, but the Ninth Circuit is oblivious to it. Instead, the "regularly followed" requirement for "adequacy" of a state ground is applied with "pointless severity," cf. *NAACP* v. *Alabama ex rel. Flowers*, 377 U. S. 288, 297 (1964), in a manner that "serves no perceivable [federal] interest." Cf. *Osborne* v. *Ohio*, 495 U. S. 103, 124 (1990).

In 1979, Stevie Lamar Fields perpetrated a "one-man crime wave," committing numerous acts of rape, robbery, forcible oral copulation, assault with a deadly weapon, kidnapping, and murder against five victims. See *People* v. *Fields*, 35 Cal. 3d 329, 336, 673 P. 2d 680, 683 (1983). The State of California provided him with a direct appeal for his claims on the trial record and a habeas proceeding for claims requiring additional facts. See *In re Fields*, 51 Cal. 3d 1063, 800 P. 2d 862 (1990). When he came back for a third bite at the apple, the state high court invoked the long-established *Dixon* rule. See *Fields* v. *Calderon*, 125 F. 3d 757, 760 (CA9 1997).

"Normally, . . . such rules constitute an adequate and independent state-law ground preventing [a federal court] from reviewing the federal claim." *Sanchez-Llamas*, 548 U. S., at 351. Not in the Ninth Circuit. Even though the rule was clear, its applicability was clear, and compliance was readily available, the Ninth Circuit branded the rule "inadequate" because the California Supreme Court subsequently felt the need to clarify and crystalize the exceptions to the rule and the circumstances under which relief from default would be granted. See *Fields*, 125 F. 3d, at 762-763.

Instead of being narrowed to the claims properly presented to the state courts, the case was sent back to the district court for consideration of the defaulted claims as well, see *id*., at 765, and another decade of litigation followed. A case that should have been over many years ago only became final this year. See *Fields* v. *Ayers*, 128 S. Ct. 1875 (2008) (denial of cert.).

The Ninth Circuit's pointless insistence on regularity of application, detached from the purpose of the adequacy rule, continues to this day. In *Bennett* v. *Mueller*, 322 F. 3d 573, 585-586 (CA9 2003), the Ninth Circuit remanded a case to the district court for a new round of litigation to determine if the state courts "regularly" enforce their rule, even though there had been no showing that the defendant had insufficient notice or opportunity to comply or that state rules had been applied in a discriminatory manner. Such remands are routine. See, *e.g.*, *McKinney* v. *Kane*, No. 05-56830, 2008 U. S. App. Lexis 10952 (CA9, May 16, 2008) (unpublished) (requiring further litigation of claim of instructional error raised for the first time on the *fourth* state habeas petition). Although the Ninth Circuit has created this morass of pointless litigation, this Court's confused jurisprudence on adequate state grounds has made it possible. The present case provides an opportunity to bring clarity to this area.

II. "Reasonable opportunity" should be adopted as the test of adequate state procedural grounds, and the prior patchwork of confusing phrases discarded.

A. "An Untidy Area."

Justice Frankfurter once referred to habeas corpus as "an untidy area of our law that calls for much more systematic consideration than it has thus far received." *Sunal* v. *Large*, 332 U. S. 174, 184 (1947) (dissenting opinion). The same could be said today of the "adequate and independent state grounds" doctrine.

The problem of adequate and independent state grounds is common to state-prisoner habeas cases under 28 U. S. C. § 2254 and this Court's direct review of state judgments under 28 U. S. C. § 1257. See *Lee* v. *Kemna*, 534 U. S. 362, 375 (2002). Most of this Court's precedents on the subject are in the latter category. These precedents span the entire twentieth century, and they form a haphazard patchwork, offering "Varying Rubrics" for defining inadequacy. See R. Fallon, D. Meltzer, & D. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System 557 (5th ed. 2003) (cited below as "Hart & Wechsler"). The phrases offered up include "without any fair or substantial support," *Ward* v. *Board of Commr's of Love Cty.*, 253 U. S. 17, 22 (1920), "arid ritual of meaningless form," *Staub* v. *City of Baxley*, 355 U. S. 313, 320 (1958), the defendant "could not fairly be deemed to have been apprised of [the rule's] existence," *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 457 (1958), a rule not previously applied "with the pointless severity" of the present case, *NAACP* v. *Alabama ex rel. Flowers*, 377 U. S. 288, 297 (1964), "impos[ing] unnecessary burdens upon [federal] rights," *Brown* v. *Western R. Co. of Ala.*, 338 U. S. 294, 298 (1949), "more properly deemed discretionary than jurisdictional," *Sullivan* v. *Little*

Hunting Park, Inc., 396 U. S. 229, 234 (1969), "not strictly or regularly followed," *Barr* v. *City of Columbia*, 378 U. S. 146, 149 (1964), and finally, whether "the practice gives to the litigant a reasonable opportunity to have the issue as to the claimed right heard and determined by [the state] court." *Central Union Tel. Co.* v. *Edwardsville*, 269 U. S. 190, 194-195 (1925); *Parker* v. *Illinois*, 333 U. S. 571, 574 (1948) (quoting and following *Central Union*).

One scholar surveying the varying formulations declared that "the governing rules may be discerned less in what the Court has been saying than in what it has been doing." Hill, The Inadequate State Ground, 65 Colum. L. Rev. 943, 944 (1965). More than once, the Court has used broad language to declare a state ground inadequate and then refused to review a claim in a later case that would seem to come within that language, never explaining the apparent inconsistency.

Davis v. *Wechsler*, 263 U. S. 22, 23 (1923), involved a jurisdictional objection based on an executive order implementing a federal statute. The objection was rejected by the state court on the ground that the objecting party had waived it by entering a general appearance, even though the pleading making the appearance clearly stated the objection. *Id.*, at 24. Justice Holmes, in often-quoted language, rejected the contention that this ground blocked Supreme Court review. "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Ibid.*

This statement seems to imply a sweeping authority to disregard state procedural defaults, so long as the objection is "plainly and reasonably made." The appellant in *Central Union*, *supra*, thought so. It had

forfeited its constitutional claims, under well-established Illinois rules, by taking its appeal to the intermediate appellate court rather than the Illinois Supreme Court. 269 U. S., at 193-194. There was nothing unplain or unreasonable about its statement of its claims. Yet the Court held that the state procedural default ground was adequate, stating the "reasonable opportunity" standard quoted *supra*, at 9. The two cases were decided only two years apart. Both were unanimous. Eight Justices participated in both cases, including the authors of both opinions. Yet there is no explanation of why a claim that seems to come within the language of *Davis* was rejected in *Central Union*.

Henry v. *Mississippi*, 379 U. S. 443, 447 (1965), seemed to say that the test was whether the state rule served a "legitimate state interest."[2] In *Monger* v. *Florida*, 405 U. S. 958 (1972) (*per curiam*), the defendant's claim had been barred by one of the rare procedural rules that appears to lack a legitimate interest. He had filed his notice of appeal too early, before formal entry of judgment, and did not renew it afterward. *Id*., at 958-959 (Douglas, J., dissenting). The dissent quoted *Henry* to no avail. *Id*., at 961-962. The Court's summary order merely states the claim is barred. See *id*., at 958; see also Hart & Wechsler, *supra*, at 561, and n. 12 (citing *Monger* for the proposition that "for the most part Henry has been ignored in subsequent

2. We hedge with "seemed," because the *Henry* opinion is universally considered unclear. See Hart & Wechsler, *supra*, at 561 ("confusing"); 16B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4020, p. 288 (2d ed. 1996) ("surprisingly ambiguous"); Sandalow, Henry v. Mississippi and the Inadequate State Ground: Proposals for a Revised Doctrine, 1965 Sup. Ct. Rev. 187, 196, n. 39 ("puzzling"); Hill, *supra*, 65 Colum. L. Rev., at 984, n. 173 ("confusing"); *id*., at 986, n. 174 ("unclear").

cases"); 16B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4028, pp. 396-397 (2d ed. 1996); R. Stern, E. Gressman, S. Shapiro, & K. Geller, Supreme Court Practice § 3.26, pp. 213-214 (8th ed. 2002) (comparing *Henry* with *Wainwright* v. *Sykes*, 433 U. S. 72 (1977)).

At times, the standard seems to appear out of nowhere. In *Henry*, *supra*, the Court declared that its "legitimate state interest" standard was based on settled law, 379 U. S., at 447, but this assertion is simply false. See Hill, 65 Colum. L. Rev., at 988; Wright, Miller, & Cooper, *supra*, § 4020, at 289 (cases cited do not support this statement); Glennon, The Jurisdictional Legacy of the Civil Rights Movement, 61 Tenn. L. Rev. 869, 899 (1994) ("remarkable remake of the . . . doctrine"). Similarly, *Barr* v. *City of Columbia*, 378 U. S., at 149, claimed that its "strictly or regularly followed" standard reflected established precedent. This is an overstatement, to put it mildly, see Hill, *supra*, at 962, n. 71, unsupported by the earlier cases. *Barr* cites four cases for this proposition, yet the word "strictly," which has been the source of much mischief since *Barr*, does not appear in the statement of the rule in any of the four. *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S., at 457, sets forth the novelty/fair notice standard. *Wright* v. *Georgia*, 373 U. S. 284, 291 (1963), and *NAACP* v. *Alabama ex rel. Flowers*, 377 U. S. 288, 301 (1964) (*per curiam*), quote *Patterson*. *Shuttlesworth* v. *Birmingham*, 376 U. S. 339 (1964), is a summary reversal citing *Williams* v. *Georgia*, 349 U. S. 375 (1955), but not otherwise stating a test. *Williams* was a case of discriminatory use of a discretionary power, such that "the state court action in the particular circumstances is, in effect, an avoidance of the federal right." *Id.*, at 383 (footnote omitted). The "strictly" requirement in *Barr* was a bolt from the blue, and, as

discussed *infra*, at 17, one that can cause perverse results if taken literally.

In *Walker* v. *Birmingham*, 388 U. S. 307, 319 (1967), the Court described *Barr* as a case "where a state court has followed a regular past practice of entertaining claims in a given procedural mode, and without notice has abandoned that practice to the detriment of a litigant who finds his claim foreclosed by a novel procedural bar." If *Barr* itself had used these words, instead of its unprecedented and unnecessary "strictly" language, much confusion could have been avoided.

Some cases in the series reach eminently sensible results on their facts, entirely consistent with precedent, yet inexplicably assert indefensible and unprecedented rationales for them. *Sullivan*, *supra*, is the worst of this lot. The state ground was indeed inadequate because, as Justice Harlan explained in dissent, the appellant had no reason to believe that the procedure he followed was not in compliance. See 396 U. S., at 245-247 (applying the *Patterson* novelty standard). Instead of applying this well-established standard, the *Sullivan* majority made the breathtaking assertion that all rules involving the exercise of discretion are inadequate. See *id*., at 234; see also *infra*, at 17 (quoting Wright, et al., critique of *Sullivan*). Although *Williams* v. *Georgia*, 349 U. S., at 389, also was based on the discretionary nature of the rule, it was the discriminatory use of that discretion, rather than the mere existence of discretion, that enabled federal review. See *id*., at 383.

A single, coherent standard is long overdue. The standard should accommodate the need to respect state procedures while recognizing the responsibility of the states to provide meaningful remedies for federal claims, and opening the door to federal relief when they do not. Respect for *stare decisis* also requires a stan-

dard consistent with the results in most of the precedents. That standard, *amicus* submits, can be formed by combining *Patterson*'s "fairly . . . apprised" with *Central Union*'s "reasonable opportunity." That is, the claimant should have fair notice that the rule exists and applies to the circumstances, and he should have a reasonable opportunity to present his federal claim. See Wright, Miller, & Cooper, *supra*, § 4027, at 386-387, 392. Nothing more is required.[3]

B. Policy Reasons.

There are solid policy reasons for federal courts to respect the procedural rules of state courts. See *Coleman* v. *Thompson*, 501 U. S. 722, 745-747 (1991). In our federal system, state courts must necessarily adjudicate federal questions, because it would be impractical to remove every case with a federal issue to federal court. Practical considerations also preclude having two different sets of procedural rules: one for state issues and another for federal. See Wright, Miller, & Cooper, *supra*, § 4021, at 302. A single objection will often have both state and federal grounds, such as the hearsay rule and the Confrontation Clause or the Takings Clause of the Fifth Amendment and a parallel provision of the state Constitution. Having two different sets of rules for the time to raise a single objection would be chaotic.

At one point, Petitioner appears to be arguing for a *Henry*-like standard that all federal objections are

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3. In a criminal case, if trial counsel fails to use the reasonable opportunity, that may form the basis of an ineffective assistance claim, either as an independent claim or as "cause" for the default. That claim, in turn, must be presented to the state courts at the proper time, if one is provided. See *Edwards* v. *Carpenter*, 529 U. S. 446, 452 (2000). In a civil case, a malpractice suit would be the remedy.

preserved if they are made in a manner that is adequate in the particular case, regardless of whether the party complied with clearly established state rules. See Brief for Petitioner 31. Such a rule would be "mischievous," see *Lee* v. *Kemna*, 534 U. S. 362, 394 (2002) (Kennedy, J., dissenting), and the suggestion should be rejected.

On habeas corpus, there is an additional reason for recognizing and giving effect to state procedural default rules. The requirement that the petitioner first exhaust state remedies is a time-honored federal policy. See 28 U. S. C. § 2254(b), (c); *Ex parte Royall*, 117 U. S. 241, 253 (1886). Respect for state procedural default rules is necessary to " 'protect the integrity' of the federal exhaustion rule." *O'Sullivan* v. *Boerckel*, 526 U. S. 838, 848 (1999) (quoting *id*., at 853 (Stevens, J., dissenting)). Without the default rule, "a prisoner could evade the exhaustion requirement—and thereby undercut the values that it serves—by 'letting the time run' on state remedies." *Ibid*.; see also *id*., at 848 (opinion of the Court quoting the dissent on this point).

Balanced against these considerations are "the federal interests in protecting federal rights against bad procedure." Wright, Miller, & Cooper, *supra*, § 4021, at 302. Underlying many of the old cases is a strong, if unstated, suspicion of state-court hostility to the underlying federal law. It is no coincidence that the most sweeping statements come in cases of black defendants and the NAACP from the South at the height of the civil rights struggle. See Sandalow, Henry v. Mississippi and the Inadequate State Ground: Proposals for a Revised Doctrine, 1965 Sup. Ct. Rev. 187, 190; see also Glennon, 61 Tenn. L. Rev., at 885-902 (describing how state grounds doctrine shifted during the civil rights struggle and has since shifted back). Fortunately, this era is behind us, and has been for some time. See *Stone* v. *Powell*, 428 U. S. 465, 493,

n. 35 (1976). This is not to say the Court was wrong to do what it did in the 1960s. Great struggles may require drastic measures, but when the crisis is over we should return to the normal modes of procedure. See *Ex parte Milligan*, 4 Wall. (71 U. S.) 2, 109 (1866).

Conscious hostility is not the only danger to federal rights, however. Sometimes a generally fair rule can operate in an unfair manner in a particular case, cutting a party off without a realistic opportunity to make its case. See *Michel* v. *Louisiana*, 350 U. S. 91, 95 (1955). For example, *Hathorn* v. *Lovorn*, 457 U. S. 255, 262-263 (1982), involved a rule against raising new issues in a petition for rehearing. This is generally a fair and unobjectionable rule. In the particular case, though, the state court had salvaged a facially unconstitutional statute through drastic and unexpected surgery, see *id*., at 258-259, thereby raising a different federal question from the one originally presented. As a practical matter, the petition for rehearing was the first opportunity to raise this claim. Federal rights need protection from an unreasonable refusal to make a needed exception to a normally fair rule.

Lee v. *Kemna*, 534 U. S., at 382-383, is arguably a case of this type. Although a requirement that a motion for continuance be in writing and supported by affidavit is normally fair, it would have been impractical and pointless in the unusual circumstances of the case. *Lee* could also be read more broadly, "to adopt a sweeping general view that 'close enough is good enough,' rejecting the adequacy of state procedural grounds merely because no important procedural interest seems at risk in the specific circumstances." Wright, Miller, & Cooper, *supra*, § 4028, at 46 (2008 Supp.) Such a reading would make *Lee* a radical departure from precedent, though, see *ibid*., and it would validate the dissent's charge that the majority was reviving the

discredited approach of *Henry* v. *Mississippi*, 379 U. S. 443 (1965). See Hart & Wechsler, *supra*, at 562-563. The *Lee* Court denies it does either of these, see 534 U. S., at 386, so a broad reading of *Lee* is not correct. See *Johnson* v. *Texas*, 509 U. S. 350, 365-366 (1993) (an opinion cannot be read so broadly as to overrule earlier precedents, when the opinion itself expressly holds it does not create a new rule).

The fact that adequacy of a state procedural rule requires making an ad hoc exception in an unusual, unforeseen case such as *Lee* further illustrates the perversity of the Ninth Circuit's insistence that rules can be declared inadequate for not specifying the exceptions in advance or for being too generous in making exceptions. See *supra*, at 6.

Another situation which still arises on occasion is the inherently fair rule that is unfairly applied retroactively. A state may legitimately specify *in advance* which of two possible remedies a claimant must pursue, but it cannot "bait and switch." See *Reich* v. *Collins*, 513 U. S. 106, 111 (1994). Similarly, there is a federal interest in protecting federal rights from unforeseeable applications of existing rules. See *supra*, at 12 (discussing *Sullivan*). A competent lawyer should be able to discern the contours of the rule with sufficient clarity that he or she knows what to do to safely preserve the claim. See *Walker* v. *Birmingham*, 388 U. S., at 320 (petitioners "on notice" of the correct procedure and not "entrapped or misled"). That does not mean that the boundaries of the rule must be so crisp that the lawyer can confidently skate on the edge. There are good reasons for rules to be flexible, see Wright, Miller, & Cooper, *supra*, § 4026, at 386, and flexibility necessarily creates fuzzy boundaries. Fair notice means that a procedure that appears to be in *clear* compliance cannot suddenly be declared to be a default.

However, there is *no* federal interest in compelling or even encouraging the states to purge all discretion from the operation of their procedural default rules. This is the perverse incentive of opinions such as the majority in *Sullivan* v. *Little Hunting Park, Inc.*, *supra*.

> "The possible implication in the Sullivan opinion that discretionary state grounds cannot provide adequate reason to refuse to consider a federal question is unwarranted. There are many valid reasons for framing procedural rules in general, 'discretionary' terms. Precisely defined rules cannot take account of the gravity of a procedural failure, the strength of the excuses offered, or the importance of the procedural and substantive consequences of excusing or punishing the failure. In many circumstances, appellate courts invest lower courts with discretion both because of a belief that a better decision will result, and because of a conviction that in any event the matter does not justify the institutional cost of plenary review. Although there is a modest risk that discretionary procedural sanctions may be invoked more harshly against disfavored federal rights, that does not warrant blanket disregard of state procedure. Instead, the discretionary nature of the state rule may be considered in applying the better tests of adequacy set out in the next section. If discretion has been exercised to impose novel and unforeseeable requirements without fair or substantial support in prior state law, or to deny a fair opportunity to present federal claims, the state ground may be found inadequate." Wright, Miller, & Cooper, *supra*, § 4026, at 385-386.

Along the same line, there is no federal interest in denying effect to any state procedural rule which is not "strictly" applied in the sense of iron-clad severity. Again, such a formulation provides a perverse incentive

for states to make their default rules more severe and less flexible than the state might otherwise choose. "The Court should continue to recognize that sound procedure often requires discretion to exact or excuse compliance with strict rules, and ordinarily should leave the discretion to state courts." *Id.*, § 4028, at 403.

Dugger v. *Adams*, 489 U. S. 401 (1989), illustrates that this Court does not apply the "strictly" requirement literally. The dissent argued that the Florida Supreme Court had reached the merits in two other cases despite the same default, and therefore, under *Barr*, the state rule was inadequate. *Id.*, at 416-418 (Blackmun, J., dissenting). The majority rejected this argument, noting that the rule was applied in "the vast majority of cases." *Id.*, at 411, n. 6. The Court noted that even though the failure to clearly state the procedural default in a few cases would permit federal habeas review in those particular cases, it would not "undercut the adequacy" of the rule in general. *Id.*, at 412, n. 6.

No doubt in the mid-1960s there was a legitimate concern underlying the apparent distrust of discretionary or less-than-strict rules. That was the suspicion they were being used discriminatorily against federal rights, civil rights organizations, and black criminal defendants. See Glennon, 61 Tenn. L. Rev., at 895 (noting "state court efforts to use their procedural rules to impede the civil rights movement"). In 2008, that possibility may not have vanished entirely,[4] but it is a faint shadow of what it was in 1964. Today, the cure is far worse than the disease. Flexibility and discretion in

4. The present case may very well be a case of bad-faith manipulation of procedural rules against an unpopular defendant.

the application of default rules should be encouraged, not discouraged.

If the state courts really did exercise discretion so as to discriminate on the basis of race or against fundamental rights, that would be a violation of the Equal Protection Clause by itself. A requirement of truly strict application could only be justified as a kind of conclusive presumption to relieve the claimant of the difficult burden of proving discrimination. Such presumptions should only be used where they produce the correct result most of the time. See *Coleman* v. *Thompson*, 501 U. S., at 737. Presuming discrimination from a lack of iron rigidity in the application of default rules would reach the wrong result nearly all of the time.

In general, then, the requirements of fair notice and a reasonable opportunity to comply accommodate all the important policy considerations. Two supplemental rules should also be recognized to deal with unusual situations. A state rule should not be allowed to defeat the policy of a pertinent federal statute, and actual, invidious discrimination in the application of a state rule independently violates the Equal Protection Clause.

C. Consistency with Precedent.

As we noted earlier, respect for *stare decisis* requires that any restatement of the doctrine of adequate and independent state grounds be as consistent as possible with precedent. No coherent theory could possibly embrace the widely disparate language of the precedents, but it is possible to reconcile all but one of the major cases on their facts. "It is black letter law that the holding of a case is determined by taking account (a) of the facts treated by the judge as material, and (b) his decision as based on them." *People* v. *Davis*, 7

Cal. 4th 797, 823, 872 P. 2d 591, 608 (1994) (Mosk, J., dissenting) (internal quotation marks omitted). Hence, consistency with the material facts is at least as important as consistency with the language.

First, we can put to one side those cases in which the state rule operates contrary to the policy of a federal statute or regulation. *Davis* v. *Wechsler*, 263 U. S. 22 (1923) belongs in this category. That case involved a suit against a railroad under federal control, and it was brought in violation of a federal executive order prescribing the venue of such suits. See *id*., at 23; see also *Alabama & Vicksburg R. Co.* v. *Journey*, 257 U. S. 111, 112-114, and n. 1 (1921) (quoting and upholding the order). The purpose of the order was to divest the court of authority to hear the case at all, so the policy considerations supporting respect for state procedure, see *supra*, at 13, diminish to the vanishing point. It would defeat the policy of the order and the statute it implemented to allow a minor misstep in local procedure to subject a federally controlled entity to suit in a court where the case never should have been. Taking a limited view of *Davis*, such as this one, is necessary to reconcile it with *Central Union Tel. Co.* See *supra*, at 9-10.[5] *Brown* v. *Western R. Co. of Ala.*, 338 U. S. 294 (1949), can be considered in the same special class. "*Brown* did not involve a pleading problem at all but rather a misconception by the state court as to the governing substantive [federal statutory] law." Hill, *supra*, 65 Colum. L. Rev., at 973.

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5. An alternative limited view of *Davis* is that the state court's procedural ruling was novel and surprising. See Hill, *supra*, 65 Colum. L. Rev., at 975-976. If Professor Hill is correct, the *Davis* holding on its facts is consistent with our proposed general standard.

The federal statute cases aside, we turn to the facts of other cases. The easiest cases are those where the state rule, as applied, is so grossly unfair as to violate due process. *Reece* v. *Georgia*, 350 U. S. 85 (1955), is the exemplar of this group. The indigent defendant's time to challenge the composition of the grand jury expired before counsel was appointed. See *id*., at 89-90. This is obviously not a reasonable opportunity to state his federal claim, however clearly established the rule might have been.

Cases involving new rules unfairly applied retroactively fit with our proposed requirement of fair notice. These include *Ford* v. *Georgia*, 498 U. S. 411, 424 (1991), *Johnson* v. *Mississippi*, 486 U. S. 578, 587-589 (1988) (state case law at the time of the "default" indicated that the procedure defendant used was proper), and *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 457 (1958) ("petitioner could not fairly be deemed to have been apprised of [the rule's] existence"). *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill*, 281 U. S. 673, 677-678 (1930), found that the retroactive application of a new rule defaulting the federal claim was a due process violation, so this case fits both categories.

Closely related are those cases where the state rule was clearly established before the "default," but the procedure followed by the federal claimant appeared to be in compliance with the rule as applied up to that time. These include the infamous *Rogers* v. *Alabama*, 192 U. S. 226, 229-230 (1904) (two-page motion stricken as "prolix"), *Sullivan* v. *Little Hunting Park*, discussed *supra*, at 12, and *Barr* v. *City of Columbia*, 378 U. S. 146, 149 (1964). In *Barr*, the state court had held that the objection was "too general to be considered." *Ibid*. Yet, this Court noted, in four other nearly contemporaneous cases, the state court had considered

equally general objections and, significantly, had *granted* relief in two of those cases. See *ibid*. Cases granting relief are more significant than cases reaching the merits but denying relief.[6] In *James* v. *Kentucky*, 466 U. S. 341, 346-348 (1984), the preexisting case law was too confused to give fair notice that defendant had to ask for an "instruction" rather than an "admonition" under the circumstances. In *Staub* v. *City of Baxley*, 355 U. S. 313, 320 (1958), the Court noted "a long line" of decisions permitting motions like the defendant's. Petitioner contends that the application of the "correct in all respects" rule in the present case fails the fair notice requirement. See Brief for Petitioner 39.

Finally, there are the cases where the rule as applied denies a reasonable opportunity to present the federal claim, however well established it may be and however fair it may be in most cases. *Hathorn* v. *Lovorn*, 457 U. S. 255 (1982), illustrates this category. The petition for rehearing in that case was the first opportunity to present the federal question as a practical matter. See *supra*, at 15. Regardless of whether the state rule against raising new issues on petition for rehearing violated due process as applied, the plaintiffs did not have a fair opportunity to present their claim, and hence the state ground was not adequate to bar federal review. In *Ward* v. *Board of Commr's of Love Cty.*, 253 U. S. 17, 23 (1920), the "coercive means" used by local authorities to illegally tax exempt Indian land had left the Indians with no reasonable opportunity to make the

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6. A decision to deny a clearly meritless claim on the merits rather than deal with a difficult procedural question may be justified as a simple matter of judicial economy. See *Lambrix* v. *Singletary*, 520 U. S. 518, 525 (1997). Such a sensible procedure should not be considered a failure to regularly enforce the rule.

prepayment challenge the state required. *Lee* v. *Kemna*, *supra*, also fits in this category. See *supra*, at 15.

The one case that cannot be reconciled on its facts is *Henry* v. *Mississippi*, 379 U. S. 443 (1965). That case involved a contemporaneous objection rule. *Id*., at 445-446. The defendant did not object to certain evidence when it was introduced, although he did later. *Ibid*. The actual holding of this confusing case was to remand to the state court with an invitation to adopt the "deliberate bypass" standard of *Fay* v. *Noia*, 372 U. S. 391 (1963) for its own procedural default rule. See *Henry*, *supra*, at 453.[7]

Henry's deficiencies were obvious at the time and were cataloged in Justice Harlan's dissent, *id*., at 457-465, and Professor Hill's article, *supra*, 65 Colum. L. Rev., at 982-992. Today, there are additional reasons the Court should not be too concerned with *Henry* as precedent. The decision itself is routinely ignored. See *supra*, at 10-11; *Lee*, 534 U. S., at 394 (Kennedy, J., dissenting). Most importantly, though, *Henry* is heavily dependent on *Fay* v. *Noia*, which has since been overruled. See Wright, Miller, & Cooper, *supra*, § 4020, at 282, 291. At this point, *Henry* has so little value as precedent that it should not prevent the formulation of a coherent standard.

In summary, a coherent standard of "adequate" state grounds is needed to replace the existing patchwork for state procedural default rules. An adequate state procedural rule is one that (1) gives fair notice that the rule exists and applies, and (2) provides a reasonable opportunity to present the claim. This

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7. The state court declined the invitation. This Court denied certiorari, superfluously adding that the denial was without prejudice to habeas relief, and Henry subsequently obtained habeas relief. See Glennon, 61 Tenn. L. Rev., at 898-899.

standard embraces the important policy considerations and is consistent with all the major precedents, except for one case that should no longer be considered a valid precedent.

CONCLUSION

The procedural default rule invoked by the Oregon Supreme Court should be considered "adequate" if, and only if, the defendant had fair notice of the existence and applicability of the rule and a reasonable opportunity to comply with it.[8]

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Respectfully submitted,

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8. *Amicus* CJLF takes no position on whether the rule is adequate under this standard or on the remaining issues in this case.